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4 AUDREY G., et al.,  
5  
6

Plaintiffs,

7 v.  
8

9 CITY OF LAFAYETTE, et al.,  
10

Defendants.  
11

Case No. [21-cv-03545-WHO](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

Re: Dkt. No. 14

12  
13 Plaintiffs Audrey G., Devin G., and Jesse B., minors, and James Larry Benton, Sr.,  
14 (collectively, “plaintiffs”) bring nine causes of action in their First Amended Complaint (“FAC”)  
15 based on alleged violations of their civil rights by Lafayette police officers during an incident on a  
16 highway. As alleged, this incident plausibly supports claims for intentional infliction of emotional  
17 distress and negligence. The officers involved are not known to plaintiffs; I will allow these  
18 claims to proceed to discovery to identify them.

19 But as defendants the City of Lafayette, Officer White, Police Chief Ben D. Alldritt, and  
20 Contra Costa County point out in their motion to dismiss, most of the causes of action are not  
21 sufficiently pleaded. Plaintiffs attempt to remedy those defects by describing in their briefing  
22 events not alleged in the FAC; this is improper. They need to allege in an amended complaint  
23 material facts that support their causes of action, including what precipitated the incident on the  
24 freeway. The FAC is DISMISSED with respect to all claims except for intentional infliction of  
25 emotional distress and negligence. While I will grant leave to amend most of the remaining  
26 claims, plaintiffs should consider which ones are actually supported by the facts they allege before  
27 amending.  
28

1

**BACKGROUND**

2

The events giving rise to this case occurred on May 6, 2020, commencing in Lafayette, California, and continuing into Alameda County via Highway 24. FAC [Dkt. No. 8] ¶ 10. Plaintiffs, who are African American, “briefly” entered a Lafayette retail store to purchase bait for a fishing trip. *Id.* at ¶¶ 3, 11. Shortly after they left the store parking lot in their vehicle, Benton, who was driving, noticed that a police car was behind them. *Id.* at ¶ 12. Two Lafayette police vehicles then followed Benton onto Highway 24. *Id.*

8

The plaintiffs allege that police “harassed” Benton as he drove through the Caldecott Tunnel and into Berkeley, despite that he had broken no laws nor committed any traffic violations. *Id.* at ¶¶ 13–14. They contend that one police car “swerved in front and back” of Benton’s car, “pulled too close to his rear bumper, flashed a blinding spotlight into the car and persisted in a series of dangerous maneuvers” as Benton drove at 65 miles per hour. *Id.* at ¶ 12. Neither police car activated a siren or flashed lights. *Id.* at ¶ 13. Police did not direct Benton to pull over, nor did he do so. *Id.* Instead, plaintiffs allege that officers used the spotlight, which “blinded” Benton and made him fear that he would “lose control of the car and injure the children in his care.” *Id.* at ¶ 15. The children were “terrified and traumatized” by this event. *Id.*

17

On or about November 3, 2020, plaintiffs filed a government tort claim with the Lafayette Police Department (“LPD”) related to the incident. *Id.* at ¶ 19. Ten days later, the LPD rejected the claims. *Id.* at ¶ 20. On or about March 23, 2021, plaintiffs filed another government tort claim with Contra Costa County; the County rejected it because of untimeliness. *Id.* at ¶¶ 21–22. Plaintiffs applied to file a late claim to the Board of Supervisors, which granted the application only for the minor plaintiffs. *Id.* at 22. On July 13, 2021, the County denied their claims. *Id.*

23

**LEGAL STANDARD**

24

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that allow the court to “draw the reasonable inference that the defendant

1 is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation  
2 omitted). There must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*  
3 While courts do not require “heightened fact pleading of specifics,” a plaintiff must allege facts  
4 sufficient to “raise a right to relief above the speculative level.” *See Twombly*, 550 U.S. at 555,  
5 570.

6 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the  
7 court accepts the plaintiff’s allegations as true and draws all reasonable inferences in their favor.  
8 *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not  
9 required to accept as true “allegations that are merely conclusory, unwarranted deductions of fact,  
10 or unreasonable inferences.” *See In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.  
11 2008).

12 If the court dismisses the complaint, it “should grant leave to amend even if no request to  
13 amend the pleading was made, unless it determines that the pleading could not possibly be cured  
14 by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making  
15 this determination, the court should consider factors such as “the presence or absence of undue  
16 delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments,  
17 undue prejudice to the opposing party and futility of the proposed amendment.” *Moore v. Kayport  
18 Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

## 19 DISCUSSION

### 20 I. SECTION 1983 CLAIM

21 Plaintiffs bring a 42 U.S.C. § 1983 claim against officer White for depriving them of rights  
22 “secured to them by the Constitutions and the laws of the United States and California.”<sup>1</sup> FAC at  
23 ¶ 28. Section 1983 is only a viable cause of action “for violations of the federal Constitution and  
24 laws”—not state law. *Sweaney v. Ada Cty.*, 119 F.3d 1385, 1391 (9th Cir. 1997). Plaintiffs clarify  
25 in their Opposition that the “FAC here alleges a violation of the federal constitution, and not a  
26 violation of state law.” Oppo. to Mot. to Dismiss (“Oppo.”) [Dkt. No. 17] 6:6–7. Accordingly, I

27  
28 <sup>1</sup> Plaintiffs state that they do not know White’s first name, nor is it stated in the defendants’ filings.

1 consider the plaintiffs' Section 1983 claim based only on the alleged violations of federal law.

2 Section 1983 is not a standalone source of substantive rights; rather, it provides a "method  
3 for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144 n.3  
4 (1979). "The first step in any such claim is to identify the specific constitutional right allegedly  
5 infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

6 Plaintiffs list multiple rights without delineating where those rights are derived from. *See*  
7 FAC at ¶ 28 (asserting plaintiffs' "rights to be free from unreasonable search and seizure,  
8 excessive force, threats, intimidation or coercion under color of law, and equal protection of the  
9 law."). However, the FAC falls short of failing to "give the defendant fair notice of what the  
10 claim is and the grounds upon which it rests," as the rights listed are readily identified in the  
11 Constitution. *Twombly*, 550 U.S. at 545 (internal citation omitted). The defendants have  
12 accurately identified the specific amendments under which each right is granted: the Fourth and  
13 Fourteenth Amendments. *See* Mot. to Dismiss ("MTD") [Dkt. No. 14] 4. The plaintiffs identified  
14 the same amendments in their Opposition. *See* Oppo. at 6–10. Below I evaluate the Section 1983  
15 claim as it relates to the Fourth and Fourteenth Amendments.

#### 16       A.     **Fourth Amendment Search and Seizure**

17 The Fourth Amendment to the Constitution provides:

18       "The right of the people to be secure in their persons, houses, papers,  
19       and effects, against unreasonable searches and seizures, shall not be  
20       violated, and no Warrants shall issue, but upon probable cause,  
21       supported by Oath or affirmation, and particularly describing the  
22       place to be searched, and the persons or things to be seized."

23       U.S. Const. amend. IV. Dismissal of a Fourth Amendment claim is warranted when the  
24       court concludes that plaintiffs could prove no facts establishing a search or seizure. *See Brower v.*  
25       *Cty. of Inyo*, 489 U.S. 593, 598 (1989). A search or seizure alone is insufficient to create liability  
26       under Section 1983; the search or seizure must also be "unreasonable." *See id.* at 599. A  
27       fundamental defect in the FAC is that plaintiffs have neither alleged a search nor a seizure.

##### 28       1. Search

29       The threshold consideration in whether a search occurs under the Fourth Amendment is  
30       whether "a person has a constitutionally protected reasonable expectation of privacy." *Katz v.*

1        *United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Plaintiffs argue in their  
2        Opposition that “police had no right to shine a light into a private vehicle that was not being pulled  
3        over, was not the subject of a traffic stop, [and] where the officers were not even pretending to be  
4        concerned about violations of the Vehicle Code.” Oppo. at 7:4–7. They further contend that  
5        “[a]bsent any reasonable suspicion of wrongdoing, the interior of one’s car is one’s private space.”  
6        *Id.* at 7:7–8. A person in a car has a lesser reasonable expectation of privacy than in a home, as a  
7        car “travels public thoroughfares where its occupants and its contents are in plain view.” *Cardwell*  
8        *v. Lewis*, 417 U.S. 583, 590 (1974). “There is no legitimate expectation of privacy shielding that  
9        portion of the interior of an automobile which may be viewed from outside the vehicle by either  
10        inquisitive passersby or diligent police officers.” *Texas v. Brown*, 460 U.S. 730, 740 (1983)  
11        (internal citations omitted). And the use of a searchlight or flashlight by a police officer is not  
12        prohibited by the Constitution. *See United States v. Lee*, 274 U.S. 559, 563 (1927); *see also*  
13        *United States v. Hood*, 493 F.2d 677, 680 (9th Cir. 1974) (holding that an officer’s use of a  
14        flashlight to look inside a car “did not constitute a search and what he saw was encompassed  
15        within the plain view doctrine.”).

16        Given the lesser degree of privacy in vehicles, police officers may look inside their  
17        windows—even with a flashlight—without running afoul of the Fourth Amendment. Plaintiffs  
18        cite no authority to the contrary. Because there was no search, the plaintiffs have not adequately  
19        pleaded a Section 1983 claim arising under this aspect of the Fourth Amendment.

20        **2. Seizure**

21        “It is quite plain that the Fourth Amendment governs ‘seizures’ of the person which do not  
22        eventuate in a trip to the station house and prosecution for crime—‘arrests’ in traditional  
23        terminology.” *Terry v. Ohio*, 392 U.S. 1, 16 (1968). However, not every interaction between a  
24        police officer and a citizen constitutes a seizure. *Id.* at 19 n.16. “Only when the officer, by means  
25        of physical force or show of authority, has in some way restrained the liberty of a citizen may we  
26        conclude that a ‘seizure’ has occurred.” *Id.* This restraint occurs only if a reasonable person  
27        would believe that he was not free to leave, in light of all of the surrounding circumstances.  
28        *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (listing examples of seizure, including:

1 “the threatening presence of several officers, the display of a weapon by an officer, some physical  
2 touching of the person of the citizen, or the use of language indicating that compliance with the  
3 officer’s request might be compelled.”).

4 Plaintiffs argue that they were seized because police “unreasonably interfered with  
5 [p]laintiffs’ freedom of movement” and that a “reasonable person would not have felt free to  
6 leave.” Oppo. at 8:3–5. The plaintiffs cite the officers’ alleged actions on the highway—  
7 swerving around Benton’s car, pulling “too close” to its back bumper, flashing the light into the  
8 car, and other “dangerous maneuvers.” *See* FAC at ¶ 12. But the FAC does not state, as plaintiffs  
9 later argue, that Benton was “forced to slow down, to change lanes, and otherwise to begin to stop  
10 and to stop in response to the officers’ dangerous and reckless driving.” *See* Oppo. at 6:20–21.  
11 Instead, plaintiffs say that further facts “will be alleged in subsequent amendments to the FAC.”  
12 *Id.* at 6:22–23.

13 I will give them that opportunity. As pleaded, the FAC fails to state that police restricted  
14 the driver’s or passengers’ freedom of movement. They have not adequately pleaded a Section  
15 1983 claim using this portion of the Fourth Amendment.

16 **B. Fourteenth Amendment Due Process Clause**

17 The Due Process Clause of the Fourteenth Amendment prohibits the state from depriving  
18 “any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. If  
19 a constitutional claim is “covered by” a specific constitutional provision, the claim must be  
20 analyzed under that provision’s standard, not the standard of substantive due process. *Cty. of*  
21 *Sacramento v. Lewis*, 523 U.S. 833, 842–43 (1998).

22 Here, the plaintiffs identify their violated liberty interest as “to be free from unreasonable  
23 searches and seizures.” Oppo. at 9:9. If a search or seizure were adequately alleged in the FAC,  
24 then any claim arising from the alleged search or seizure would be analyzed under the Fourth  
25 Amendment. But the relevant case law forecloses finding that either occurred, as described above.  
26 *See Cty. of Sacramento*, 523 U.S. at 843–44 (utilizing the substantive due process analysis because  
27 neither a search nor seizure occurred, so the claim was not covered by the Fourth Amendment).  
28 Accordingly, plaintiffs’ claim of a due process violation based on unreasonable search and seizure

1 may be analyzed through the substantive due process lens.

2 A substantive due process claim can only succeed if a plaintiff shows that the defendant  
3 deprived them of a protected life, liberty, or property interest in a manner that “shocks the  
4 conscience.” *Cty. of Sacramento*, 523 U.S. at 848–49; *Rochin v. California*, 342 U.S. 165, 172  
5 (1952). The Fourteenth Amendment is not a “font of tort law to be superimposed upon whatever  
6 systems may already be administered by the States.” *Paul v. Davis*, 424 U.S. 693, 701 (1976).  
7 Moreover, the Supreme Court is reluctant to expand the concept of due process. *See Collins v.*  
8 *City of Harker Heights*, 503 U.S. 115, 125 (1992).

9 Plaintiffs cite their “liberty interest to be free from unreasonable searches and seizures” as  
10 the basis for their substantive due process claim. Oppo. at 9:8–9. But since no search or seizure  
11 occurred, at least as currently alleged, plaintiffs have asserted no deprivation of a liberty interest  
12 under the substantive due process standard and have not adequately pleaded a violation of the Due  
13 Process Clause.

14 **C. Fourteenth Amendment Equal Protection Clause**

15 A claim brought under the Fourteenth Amendment’s Equal Protection Clause must state  
16 that the plaintiff was intentionally treated differently than other similarly situated individuals.  
17 *Recinto v. U.S. Dep’t of Veterans Affs.*, 706 F.3d 1171, 1177 (9th Cir. 2013). To survive  
18 dismissal, a complaint must plausibly suggest that the defendants acted with a discriminatory  
19 intent or purpose. *See Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). The facts must  
20 show that defendants acted “not for a neutral, investigative reason but for the purpose of  
21 discriminating.” *See Iqbal*, 556 U.S. at 677. “Bare assertions” and conclusory allegations of  
22 discriminatory purpose will not suffice. *See id.* at 681.

23 In their briefing in support of their equal protection claim, plaintiffs point to facts entirely  
24 absent from the FAC that seem to suggest liability against a party that is not a defendant in this  
25 case: a retail store. Plaintiffs assert “outrageous harassment by police because the plaintiffs were  
26 singled out by the retail store, resulting in the police being called to investigate them.” Oppo. at  
27 12:27–28. Insofar as plaintiffs accuse police of acting with a discriminatory purpose, they ask me  
28 to draw an inference unsupported by the facts listed in their Opposition, and again absent from the

1 FAC. Oppo. at 13:4–7 (“The mere fact that the Lafayette police showed up and followed  
2 [p]laintiffs from the store parking lot and onto the freeway, then engaged and encountered them in  
3 a way that any reasonable person would view as creating terror can only be viewed as  
4 demonstrating racial animus.”). The discriminatory intent alleged in the FAC and Opposition  
5 mirrors the conclusory language of the complaint dismissed in *Iqbal*. *See* 556 U.S. at 680–81.  
6 Plaintiffs have not adequately pleaded a Section 1983 claim using the Fourteenth Amendment.

7 **D. Section 1983 Claim Against White**

8 Even if the plaintiffs had adequately pleaded violations of the Fourth and Fourteenth  
9 Amendments to bring a claim under Section 1983, the claim would fail as to the only named  
10 defendant: White.

11 Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain  
12 statement of the claim showing that the pleader is entitled to relief.” To satisfy Rule 8, plaintiffs  
13 must “plead that each Government-official defendant, through the official’s own individual  
14 actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676. Importantly, Rule 8 “does not  
15 unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Id.* at  
16 678–79. Rather, the complaint must assert “well-pleaded factual allegations to advance to  
17 discovery.” *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1177 (9th Cir. 2021).

18 Here, defendants assert that plaintiffs have failed to state any claim against White because  
19 they “have not pled any facts regarding Officer White’s involvement in the alleged police  
20 encounter.” Reply [Dkt. No. 18] 2:12–13. Plaintiffs respond that they “clearly allege in the FAC  
21 that Officer White was at the scene of the events of May 6, 2020, and that he participated in  
22 them,” citing to ¶ 6:

23 “Defendant White ... is a peace officer employed by either LPD  
24 and/or Contra Costa County. He acted with deliberate indifference  
25 towards [p]laintiffs’ safety on May 6, 2020 and violated their  
26 constitutional and civil rights under federal and state law while acting  
27 under color of state law and in the course and scope of his  
employment by Defendant LPD. Plaintiffs sue Defendant White in  
his individual capacity. His true first name is unknown to Plaintiffs.  
As soon as Plaintiffs can discover his full and complete name, they  
will seek leave to amend from the Court...”

28 Oppo. at 10:15–16. But the plaintiffs then admit that they “do not yet know . . . how exactly he

1 participated in these events.” *See id.* at 10:24–25.

2 The quoted paragraph, and the entire FAC, is insufficient to adequately plead that White  
3 was involved in the encounter. Plaintiffs do not allege any fact demonstrating that White was  
4 present during the incident, was inside one of the vehicles, interacted with the plaintiffs in any  
5 way, or was even on duty. Plaintiffs’ allegations are conclusory and do not state a Section 1983  
6 claim against White.

7 For all of these reasons, the plaintiffs’ Section 1983 claim against White is DISMISSED  
8 without prejudice.<sup>2</sup>

## 9 **II. STATUTE OF LIMITATIONS FOR BENTON’S CLAIM**

10 Under the California Government Claims Act, a claim for injury to a person against a  
11 public entity must be properly filed within six months of the date the cause of action began to  
12 accrue. Cal. Gov’t Code § 911.2(a). “The filing of a claim is a condition precedent to the  
13 maintenance of any cause of action against the public entity and is therefore an element that a  
14 plaintiff is required to prove in order to prevail.” *Del Real v. City of Riverside*, 95 Cal. App. 4th  
15 761, 767 (2002). Courts have interpreted Section 911.2(a) as strictly enforceable and confirmed  
16 that a claim must satisfy the express provisions of the statute. *See DiCampli-Mintz v. Cty. of*  
17 *Santa Clara*, 55 Cal. 4th 983, 987 (2012). Even where the public entity has actual knowledge of  
18 the facts that may support the claim, a claim is barred when the filing provision was not followed.  
19 *Id.* at 989–91. Beyond strict compliance, the only way to “substantially comply” with the Section  
20 is if there is actual receipt of a misdirected claim by the public entity within the statute of  
21 limitations. *See Jefferson v. City of Fremont*, No. C-12-0926-EMC, 2013 WL 1747917, at \*9  
22 (N.D. Cal. Apr. 23, 2013).

23 Plaintiffs did not file their claims with Contra Costa County until nearly one year after the  
24 incident. FAC at ¶¶ 10, 21. Their claims were initially rejected due to untimeliness, and thereafter  
25 the minor plaintiffs were granted a second application to file a late claim. *Id.* at ¶ 22. Benton was  
26 not granted an application to file a late claim, so his claim was not timely filed with the County

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28 <sup>2</sup> Because the Section 1983 claim against White is dismissed without prejudice, any discussion of  
qualified immunity is untimely.

1 and is subject to the six-month statute of limitations. *See id.*

2 Plaintiffs contend that even though Benton did not file his claim within six months, he is  
3 entitled to tolling under the “delayed discovery” rule. *See Oppo.* at 13:27-14:6 (citing *Norgart v.*  
4 *Upjohn Co.*, 21 Cal. 4th 383, 405–06 (1999)). This rule only applies when, despite reasonable  
5 diligence, a plaintiff could not have reasonably discovered facts supporting the cause of action, not  
6 where a plaintiff misunderstands the parties’ agency relationship and does not properly file. *See*  
7 *id.* at 405 (“the date of accrual . . . is the date on which the plaintiff comes at least to suspect, or  
8 have reason to suspect, a factual basis for its elements.”); *see also Fox v. Ethicon Endo-Surgery,*  
9 *Inc.* 35 Cal. 4th 797, 808–09 (2005). Plaintiffs were aware of their claim when the incident  
10 occurred, and filed a claim with the Lafayette Police Department. *See* FAC at ¶ 19. Benton is not  
11 entitled to toll his claims against Contra Costa County and they are DISMISSED with prejudice.

### 12 III. RALPH CIVIL RIGHTS ACT<sup>3</sup>

13 The Ralph Civil Rights Act of 1976 provides that all persons within California “have the  
14 right to be free from any violence, or intimidation by threat of violence, committed against their  
15 persons or property because of” a protected characteristic, including race. Cal. Civ. Code §  
16 51.7(b)(1); § 51(b). To prove a violation of Section 51.7, a plaintiff must show: “(1) the  
17 defendant threatened or committed violent acts against the plaintiff; (2) the defendant was  
18 motivated by his perception of plaintiff’s race; (3) the plaintiff was harmed; and (4) the defendant’s  
19 conduct was a substantial factor in causing the plaintiff’s harm.” *Knapps v. City of Oakland*, 647  
20 F. Supp. 2d 1129, 1167 (N.D. Cal. 2009) (internal citation omitted).

21 Under the first element of a Section 51.7 claim, “[t]he plain meaning of the word violence .  
22 . . clearly involves some physical, destructive act.” *Campbell v. Feld Ent., Inc.*, N75 F. Supp. 3d  
23 1193, 1205 (internal citation and quotation marks omitted). However, as the language of Section  
24 51.7 makes clear, a violent act need not actually occur—the threat of one suffices. *See Ramirez v.*

25 \_\_\_\_\_  
26 <sup>3</sup> If plaintiffs amend the FAC, they should clarify who they are suing for each cause of action. For  
27 example, the plaintiffs state that this cause of action is “against Defendant White,” but also make  
28 accusations against “Defendants White and Does 1 through 10.” FAC at ¶¶ 29–32; *see also*, e.g.,  
FAC at ¶ 45–47 (mentioning only the individual defendants and the Lafayette Police Department,  
which is not named in the Amended Complaint, despite listing “all defendants.”).

1        *Wong*, 188 Cal. App. 4th 1480, 1486 (2010) (“The statute requires violence or a threat of violence;  
2        it is, after all, a ‘hate crimes’ statute.”). Notably, there is no threat of violence where there is no  
3        expression of intent to harm plaintiffs or plaintiffs’ property. *Id.*

4        As an initial matter, it is difficult to ascertain the foundation of the plaintiffs’ Ralph Act  
5        claim in the FAC, as they intermingle their arguments regarding the Unruh Civil Rights Act. *See*  
6        FAC at ¶¶ 29-33. In their Opposition, the plaintiffs clarify that the threat of violence stems from  
7        the officers’ “actions of terror” on the freeway, referencing the alleged swerving in front of the  
8        plaintiffs’ car, pulling “too close” to the back bumper, shining the spotlight, and engaging “in a  
9        series of dangerous maneuvers.” *See* Oppo. at 15:4-7 (citing FAC at ¶¶ 12-18). The plaintiffs  
10      allege that “[t]his conduct was intended to threaten [p]laintiffs with the threat of the use of force  
11      and did in fact do so.” Oppo. at 15:5-6.

12      The claim fails because the plaintiffs have not adequately pleaded the second element: that  
13      the police officers were motivated by their perception of the plaintiffs’ race. In the Opposition,  
14      plaintiffs point to the retail store as the alleged source of any racial animus. *See* Oppo. at 14-15.  
15      They suggest that the “reasonable inference” from the FAC’s allegations is that “the only reason  
16      the police were called was because the Lafayette retail store”—which is not a defendant in this  
17      action—“was suspicious of [p]laintiffs solely because of their race, an apparent suspicion adopted  
18      by [d]efendant officers.” *See id.* at 15:1-3. This inference about why police arrived at the store  
19      cannot be drawn from the FAC because no supporting facts are pleaded. Similarly, the plaintiffs  
20      do not adequately articulate any facts showing that the officers themselves were motivated based  
21      on their perceptions of the plaintiffs’ race.

22      For these reasons, the plaintiffs’ Ralph Act claim is DISMISSED without prejudice.

#### 23      **IV. BANE ACT**

24      The Tom Bane Civil Rights Act provides a cause of action “if a person . . . interferes by  
25      threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with  
26      the exercise or enjoyment by any individual or individuals of rights” secured by federal or  
27      California law. Cal. Civ. Code § 52.1(b). Any individual who suffers these harms may bring  
28      forth a civil action. *Id.* § 52.1(c). The Bane Act does not itself “provide any substantive

1 protections; instead, it enables individuals to sue for damages as a result of constitutional  
2 violations.” *Reynolds v. Cty. of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996) (overruled on  
3 other grounds by *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997)). A plaintiff  
4 must demonstrate both a violation of their constitutional rights and that the defendant had the  
5 “specific intent” to violate these rights to successfully plead a claim. *Reese v. Cty. of Sacramento*,  
6 888 F.3d 1030, 1043 (9th Cir. 2018).

7 Plaintiffs bring this claim based on the alleged Fourth Amendment violations discussed  
8 above. *See Oppo.* at 15. Because plaintiffs have not adequately pleaded any Fourth Amendment  
9 violations, and have not otherwise pleaded state constitutional violations, their Bane Act claim  
10 necessarily fails. *See Reynolds*, 84 F.3d at 1171 (“[B]ecause there is no federal constitutional  
11 violation and no . . . state constitutional violation, there is no conduct upon which to base a claim  
12 for liability under 52.1.”).

13 Even if plaintiffs had adequately pleaded a constitutional violation, the claim would still  
14 fail because there are no facts supporting that the officers harbored specific intent to violate their  
15 rights. Plaintiffs do not assert in the FAC or in their Opposition that any defendant had the  
16 specific intent to violate their rights, as is required to show a violation of the Bane Act. *See Oppo.*  
17 at 15 (repeating the assertion that defendants intended to threaten plaintiffs but remaining silent on  
18 specific intent to violate the law). The claim is DISMISSED without prejudice.

19 **V. UNRUH ACT**

20 The Unruh Civil Rights Act provides that all persons in California are “free and equal” and  
21 “entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all  
22 business establishments of every kind whatsoever,” regardless of any protected characteristic.  
23 Cal. Civ. Code § 51(b). It was intended to “create and preserve a nondiscriminatory environment  
24 in California business establishments by ‘banishing’ or ‘eradicating’ arbitrary, invidious and  
25 intentional discrimination by such establishments.” *See Oppo.* at 16:5–7 (citing *Angelucci v.*  
26 *Century Supper Club*, 41 Cal. 4th 160, 167 (2007)). However, plaintiffs ignore the last three  
27 words of their own citation: “by such establishments.” *Id.* The Unruh Act’s focus is on  
28 discrimination by businesses. *See Cohn v. Corinthian Colls., Inc.*, 169 Cal. App. 4th 523, 527

1 (2008) (“The objective of the [Unruh] Act is to prohibit businesses from engaging in . . .  
 2 discrimination.”); *McColm v. San Francisco Hous. Auth.*, No. C-06-07378-CW, 2009 WL  
 3 2901596, at \*13 (N.D. Cal. Sept. 4, 2009) (“The objective of the Unruh Act is to prohibit  
 4 businesses from engaging in unreasonable or arbitrary discrimination.”).

5 Plaintiffs’ Unruh Act claim is fatally flawed. They bring the claim against White, a police  
 6 officer, and other unnamed defendants—not a business. *See* FAC at ¶¶ 37–39. Moreover,  
 7 although the plaintiffs say that they were “singled out by the retail store which then called the  
 8 police to investigate,” the FAC makes no mention of a phone call, a suspicion by the store’s  
 9 employees, or any information supporting that any defendant communicated with the store. *See*  
 10 Oppo. at 16:18–19.

11 Further, when the plaintiffs *do* reference alleged actions by the police, those actions  
 12 occurred *after* the plaintiffs left the store. The plaintiffs make no allegation that police officers in  
 13 any way influenced their access to the store. *See* Oppo. at 16. Instead, they state that they did not  
 14 realize that a police car was following them until “after exiting the parking lot.” FAC ¶¶ at 11–12.  
 15 And the “high speed game of chicken” that the plaintiffs reference occurred on the freeway, after  
 16 they left the store. Oppo. at 16:17.

17 Should plaintiffs wish to assert an Unruh Act claim based on deprivation of equal access to  
 18 the store, they should assert it against the store. White is not a proper defendant, nor is any other  
 19 police officer or named defendant. For these reasons, the claim against them is DISMISSED with  
 20 prejudice.

## 21 VI. NEGLIGENT RETENTION, SUPERVISION, TRAINING, AND DISCIPLINE

22 Plaintiffs assert a claim for negligent retention, supervision, training, and discipline against  
 23 the LPD and Alldritt, the chief of police.<sup>4</sup> FAC at ¶¶ 40–44. California does not have cognizable  
 24 non-statutory claims against public entities; any tort liability is exclusively statutory. *Wright v.*  
 25 *California*, 122 Cal. App. 4th 659, 672 (2004). Because “the duty of a governmental agency can

26  
 27 <sup>4</sup> A point of clarification: The Lafayette Police Department is not a named defendant in this suit.  
 28 Instead, plaintiffs bring their claims against “Defendant City of Lafayette and its Police  
 Department . . . collectively referred to as ‘LPD.’” *See* FAC at ¶ 5.

1 only be created by statute or enactment, the statute or enactment claimed to establish the duty must  
2 at the very least be identified.” *Searcy v. Hemet Unified Sch. Dist.*, 177 Cal. App. 3d 792, 802  
3 (1986) (internal quotation marks omitted).

4 The FAC fails to identify or cite any statute or law violated by defendants to support this  
5 cause of action. *See* FAC at ¶¶ 40–44. In their Opposition, plaintiffs clarify that the statutory  
6 basis for their claim is California Government Code section 815.2, which imposes liability on  
7 public entities for injuries caused by the acts or omissions of their employees if the act or omission  
8 would “have given rise to a cause of action against that employee.” *See* Oppo. at 17:14–17. This  
9 vicarious liability provision offers no basis for this claim of negligent retention, supervision,  
10 training, and discipline by the employer: the Lafayette Police Department. *See Fonseca v. City of*  
11 *Fresno*, No. 1:10-CV-00147, 2012 WL 44041, at \*16 (E.D. Cal. Jan. 9, 2012) (granting summary  
12 judgment on a negligent retention claim where plaintiffs did not identify a direct liability statute).

13 Moreover, a public entity can only be vicariously liable for an employee’s acts or  
14 omissions if that employee would have been personally liable for the injury. *See de Villers v. Cty.*  
15 *of San Diego*, 156 Cal. App. 4th 238, 249 (2007); *see also Kendrick v. Cty. of San Diego*, No. 15-  
16 CV-2615, 2018 WL 1316618, at \*10 (S.D. Cal. March 14, 2018) (applying this rule to a negligent  
17 hiring, retention, and supervision claim). Again, plaintiffs cite no statute in the FAC to support  
18 liability against Alldritt. *See* FAC at ¶¶ 40–44. Plaintiffs try to correct this in their Opposition by  
19 citing California Government Code sections 815.2 and 820, which provides individual tort liability  
20 against public employees. *See* Oppo. at 17:19–22.

21 Further, plaintiffs’ claim against Alldritt is conclusory and fails to state any specific facts  
22 in support. Plaintiffs allege that these defendants were “negligent and careless in that they  
23 retained and entrusted [the officers] to provide police services, even though they knew or should  
24 have known that [the officers] were engaged in unconstitutional policing.” FAC at ¶ 42. Plaintiffs  
25 further allege that Alldritt “negligent failed to adequately train LPD officers to adequately deal  
26 with the problem of racial profiling in and by local businesses and/or residents.” *Id.* at ¶ 43. This  
27 amounts to a “formulaic recitation of the elements of [the] cause of action,” without facts  
28 supporting the allegation’s truth. *See Twombly*, 550 U.S. at 555.

1 For those reasons, plaintiffs' claim is DISMISSED against the LPD and Alldritt without  
2 prejudice.

3 **VII. INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS**

4 To bring a claim of intentional infliction of emotional distress ("IIED"), a plaintiff must  
5 show: (1) extreme and outrageous conduct by the defendant with the intention of causing, or  
6 reckless disregard of the probability of causing, emotional distress; (2) that the plaintiff suffered  
7 severe or extreme emotional distress; and (3) that the defendant's outrageous conduct actually and  
8 proximately caused that emotional distress. *Corales v. Bennett*, 567 F.3d 554, 571 (9th Cir. 2009).  
9 "Outrageous" conduct is that which is "so extreme as to exceed all bounds of that usually tolerated  
10 in a civilized community." *Tekle v. United States*, 511 F.3d 839, 855 (9th Cir. 2007). A court  
11 may decide, as a matter of law, whether a defendant's conduct, as pleaded, could be "deemed  
12 'outrageous' within that definition." *Ricard v. Pacific Indemnity Co.*, 132 Cal. App. 3d 886, 895  
13 (1982).

14 The facts plausibly suggest that the officers may have acted with reckless disregard of  
15 causing emotional distress. Defendants dismiss the actions by police as "an effort to conduct a  
16 plain-view examination of [p]laintiffs' car" and "an officer's discharge of his or her law  
17 enforcement duties." *See* MTD at 15:26–16:4. But the alleged actions are a far cry from an  
18 officer placing his hand on a cartridge holder or handcuffing a person. *See id.* at 16:4–8 (citing  
19 *Mann v. City of Chula Vista*, No. 18-CV-2525, 2020 WL 5759749, at \*11 (S.D. Cal. Sept. 28,  
20 2020)). Swerving around Benton's car, shining a spotlight inside it, and pulling close to the car's  
21 back bumper—all at a speed of 65 miles per hour—demonstrates possible reckless disregard of  
22 causing emotional distress. *See* FAC at ¶ 12. While one of these acts in isolation might not rise to  
23 the level of outrageous conduct, taken together, plaintiffs have plausibly pleaded actions that  
24 exceed what is tolerated in a civilized society.

25 Defendants do not challenge the second and third elements of plaintiffs' IIED claim.  
26 Plaintiffs allege that they were "hurt and injured in their health, strength and activity, sustaining  
27 injuries to their nervous system and person," and suffered "severe mental anguish and emotional  
28 distress" from the incident. *Id.* at ¶ 25. They further allege that the officers' actions caused their

1 distress. *Id.* With no argument to the contrary, I find that the plaintiffs have adequately alleged a  
2 claim for IIED.

3 However, this claim may only proceed against the unnamed officers and the public entity  
4 defendants. The IIED claim cannot proceed against White for the reasons stated above. Nor have  
5 plaintiffs alleged any specific acts by Alldritt relative to this claim.

6 Generally, the use of “John Doe” to identify a defendant is not favored. *Gillespie v.*  
7 *Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). However, in certain circumstances, the identities of  
8 alleged defendants will not be known before a complaint is filed. *Id.* In such situations, the  
9 plaintiff should be given the opportunity through discovery to identify any unknown defendants,  
10 “unless it is clear that discovery would not uncover the identities, or that the complaint would be  
11 dismissed on other grounds.” *See id.* I will give plaintiffs the opportunity through discovery to  
12 identify the unnamed officers subject to this claim.

13 Regarding the public entity defendants, plaintiffs have not adequately pleaded that any  
14 defendant ratified the misconduct. *See* FAC at ¶ 47; Oppo. at 19:24-20:6. Plaintiffs would need  
15 to assert facts supporting that ratification occurred, not just assert the conclusory statement that it  
16 happened. *See Williams v. City of Pleasanton*, No. 20-CV-08720-WHO, 2021 WL 3932012, at \*3  
17 (N.D. Cal. Sept. 2, 2021) (plaintiff must state “facts plausibly showing who ratified the allegedly  
18 unconstitutional acts of officers and how that ratification occurred.”). But the public entity  
19 defendants may plausibly be vicariously liable for the officers’ actions under California  
20 Government Code section 815.2, as plaintiffs allege in their Opposition. *See* Oppo. at 19:24-28.

21 Accordingly, plaintiffs’ IIED claim may proceed as pleaded against the unnamed officer  
22 defendants and the public entity defendants.

### 23 **VIII. NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS**

24 There is no “independent tort of negligent infliction of emotional distress” in California.  
25 *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 984 (1993). The tort is negligence; thus  
26 this claim is duplicative of plaintiffs’ negligence claim. *Id.*; *see also White v. Soc. Sec. Admin.*,  
27 111 F. Supp. 3d 1041, 1054 (N.D. Cal. 2015) (dismissing plaintiffs’ negligent infliction of  
28 emotional distress claim as duplicative of their negligence claim). Plaintiffs’ negligent infliction

1 of emotional distress claim is therefore DISMISSED with prejudice.

2 **IX. ASSAULT**

3 To prove assault, a plaintiff must show: “(1) that defendant intended to cause harmful or  
4 offensive contact, or the imminent apprehension of such contact, and (2) that plaintiff was put in  
5 imminent apprehension of such contact.” *Brooks v. United States*, 29 F. Supp. 2d 613, 617 (N.D.  
6 Cal. 1998). It is a tort of specific intent, meaning plaintiffs must prove that the defendants  
7 intended to put them in the reasonable apprehension of harm. *Id.* “[M]erely reckless behavior  
8 cannot give rise to an assault cause of action.” *Id.*

9 The plaintiffs again appear to conflate arguments that more appropriately apply to their  
10 other claims, rather than assault. For example, plaintiffs reference alleged behavior by police that  
11 “shocks the conscience” (substantive due process); infer that the store reported the plaintiffs to  
12 police “based solely on their race” (Unruh Act); and argue that police violated their Fourth  
13 Amendment rights. *See Oppo.* at 22–23. When the plaintiffs do raise arguments relevant to the  
14 assault claim—that defendants “maliciously, and without warrant or legal authority, intended to  
15 cause or to place [p]laintiffs in apprehension of harmful or offensive contact”—those assertions  
16 are conclusory. *See FAC* at ¶ 52. The FAC alleges no facts indicating the state of mind of White  
17 or any of the other officers that would show the requisite intent. *See id.* Alleged reckless behavior  
18 does not suffice. *See Oppo.* at 23:21–23 (arguing that the plaintiffs “were reasonable in their  
19 belief and imminent apprehension, given the reckless driving of [d]efendant officers, that harmful  
20 contact was imminent”). Even if “[p]laintiffs found the physical threats and intimidation to be  
21 harmful and offensive to their persons and dignity,” that alone is insufficient to adequately plead  
22 an assault claim.<sup>5</sup> *See FAC* at ¶ 53.

23 For these reasons, the assault claim is DISMISSED without prejudice.

24 **X. NEGLIGENCE**

25 A negligence claim under California law requires that a plaintiff show: (1) a duty on the  
26 part of defendant; (2) breach of that duty; (3) causation and; (4) damages. *Strong v. California*,

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27  
28 <sup>5</sup> Plaintiffs also make the same ratification argument discussed *ante* in the IIED section, which  
fails for the same reasons.

1 201 Cal. App. 4th 1439, 1449 (2011).

2 Plaintiffs allege that defendants had a duty to “protect [p]laintiffs and refrain from harming  
3 them,” as well as a duty to “refrain from discriminating, harassing and assaulting [p]laintiffs based  
4 on the color of their skin.” FAC at ¶¶ 56–59. Defendants only take issue with duty, arguing that  
5 the FAC “establishes neither discrimination nor harassment,” nor “any facts to establish that the  
6 patrol vehicles targeted [plaintiffs] based on the color of their skin.” *See* MTD at 18:17–19:5.

7 Courts have imposed a duty to protect on police officers when their conduct “contributes  
8 to, increases, or changes the risk which would have otherwise existed.” *See Motley v. Smith*, No.  
9 1:15-CV-00905, 2016 WL 3407658, at \*12 (E.D. Cal. June 20, 2016) (internal quotation marks  
10 and citation omitted); *see also Pierce v. Cty. of Marin*, 291 F. Supp. 3d 982, 1001 (N.D. Cal.  
11 2018) (noting that police may have a duty to act when they “created or increased a peril by  
12 affirmative acts”). Plaintiffs have sufficiently pleaded such circumstances here, by alleging the  
13 affirmative actions by officers on the highway. *See* FAC at ¶¶ 12–13. The purported facts—  
14 swerving around a vehicle and blinding its driver with a spotlight, all while driving at a speed of  
15 65 miles per hour—gives rise to a reasonable inference that the officers created or increased a peril  
16 to plaintiffs. Accordingly, I find that plaintiffs have sufficiently pleaded a duty by officers to  
17 protect them.

18 Like the IIED claim, this claim may proceed only against the unnamed officers and public  
19 entity defendants, for the same reasons stated above.

## 21 CONCLUSION

22 For the foregoing reasons, the defendants’ motion is GRANTED in part and DENIED in  
23 part. The FAC is DISMISSED for all claims except intentional infliction of emotional distress  
24 and negligence against the entity defendants and unknown police officers involved in the incident.  
25 Plaintiffs are granted leave to amend every cause of action except the Unruh Act and negligent  
26 infliction of emotional distress claims, and all of Benton’s claims against Contra Costa County,  
27  
28

1 which are dismissed with prejudice. Any amended complaint is due by December 17, 2021.

2 **IT IS SO ORDERED.**

3 Dated: November 29, 2021

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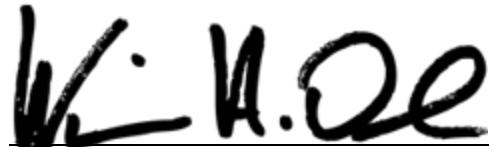
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William H. Orrick  
United States District Judge